Citation: *EH v Canada Employment Insurance Commission*, 2022 SST 900

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 27, 2022 (GE-22-1087)

Tribunal member:	Charlotte McQuade
Decision date:	September 14, 2022
File number:	AD-22-462

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] E. H. is the Claimant. On January 11, 2022, the Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to benefits from May 2, 2021, because he had not proven his availability for work while attending school full-time. This caused an overpayment of the benefits the Claimant had received.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant was a full-time student and he had not rebutted the presumption of non-availability in the law that applied to full-time students. The General Division also decided that the Claimant had not proven his availability for work from May 2, 2021.

[4] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to go forward. The Claimant argues that the General Division made an important error of fact when it decided he was not available for work. He says he was available for full-time work because he had a history of working full-time from March to April 2021, while attending high school online. He also says that from May 2, 2021, to the end of June 2021, he was only taking two online courses so he could have worked full-time.

[5] I am satisfied that the appeal has no reasonable chance of success. So, I am refusing leave to appeal. This means the Claimant's appeal cannot proceed.

Issue

[6] Is it arguable that the General Division based its decision that the Claimant was not available for work from May 2, 2021, on an important error of fact?

Analysis

[7] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[8] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1]

[9] The law says that I can only consider certain types of errors.[2] There errors are:

- The General Division hearing process was not fair in some way
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided or it decided something it did not have the power to decide)
- The General Division based its decision on an important error of fact
- The General Division made an error of law

[10] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

It is not arguable that the General Division based its decision about the Claimant's availability on an important error of fact

[11] It is not arguable that the General Division based its decision that the Claimant was not available for work from May 2, 2021, on an important error of fact.

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[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[2] Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal.
[3] See *Osaj v Canada (Attorney General),* 2016 FC 115, which describes what a "reasonable chance of success" means.

[12] The Commission disentitled the Claimant from benefits from May 2, 2021, for reason he had not proven his availability for work while attending school full-time.

[13] The Claimant appealed that decision to the Tribunal's General Division.

[14] The General Division had to decide whether the Claimant had proven his availability for work from May 2, 2021.[4]

[15] The law says that full-time students are presumed to be unavailable for work.[5]

[16] However, they can rebut the presumption if they can show they have a history of combining full-time work with full-time school.[6] They can also rebut the presumption by showing exceptional circumstances.[7]

[17] If the presumption is rebutted, the student still has to prove that they are capable of and available for work and unable to obtain suitable employment.

[18] To prove availability, three factors must be considered.[8] These are:

- Whether the claimant wants to go back to work as soon as a suitable job is available.
- Whether the claimant has made efforts to find a suitable job.
- Whether the claimant has set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

[19] The General Division made a finding of fact that the Claimant was a full-time student, while he was attending high school in May and June 2021 and when at College, which he started in September 2021. In reaching this decision, the General

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[4] The requirement to prove availability is set out in section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96, which describes these three factors.

Division said the Claimant had not disputed this and there was no evidence to suggest otherwise.[9] This meant the presumption of non-availability applied to the Claimant.

[20] The General Division considered whether the Claimant had rebutted that presumption but decided he had not because he had not shown he had enough of a history of full-time work combined with full-time school. As well, he had not shown exceptional circumstances.[10]

[21] The General Division then went on to consider whether the Claimant had proven his availability for work.[11] The General Division decided that the Claimant had a sincere desire to return to the labour market. The General Division also decided the Claimant had made enough efforts to find a job in May and June 2021, and after December 2021, but not from July to December 2021. The General Division found further that the Claimant had a set a personal condition of prioritizing his attendance at school, both while in high school and College, which unduly limited his chances of returning to the labour market. So, the General Division concluded the Claimant had not proven his availability for work from May 2, 2021.

[22] The Claimant argues that the General Division based its decision that he was not available for work from May 2, 2021, on important errors of fact. He says he was available for full-time work because:

- He had worked full-time from March to April 2021, while attending high school remotely, and
- He was only taking two online courses at high school from May 2, 2021, to the end of June 2021 so he could have worked full time.

[23] It is not every error of fact that allows the Appeal Division to intervene. For the Appeal Division to intervene on an error of fact, the General Division must have based

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[9] See paragraph 15 of the General Division decision.
[10] See paragraphs 27 and 28 of the General Division decision.
[11] Section 18(1)(a) of the EI Act says that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (a) capable of and available for work and unable to obtain suitable employment.

its decision on the error of fact. So, it must be a material fact. As well, the erroneous finding of fact must have been made in a perverse or capricious manner or without regard to the material before it.[12]

[24] The General Division was aware the Claimant was only taking two high school courses from May 2, 2021, to the end of June 2021, when it found as a fact the Claimant was a full-time student.

[25] The General Division specifically noted in its decision that the Claimant testified that he was taking only two courses in May and June 2021.[13]

[26] The General Division's finding of fact that the Claimant was a full-time student was supported by the evidence. The Claimant declared on a training questionnaire dated May 14, 2021, that he was taking two courses at a secondary school, one from May 6, 2021, to June 29, 2021, and the other from April 29, 2021, to June 22, 2021. He also said in that questionnaire that he was spending 15 to 24 hours a week on his studies, and his school considered this a full-time program.[14]

[27] The Claimant also declared on that training questionnaire that the College Program he was to attend from September 1, 2021, to June 1, 2022, was considered full-time by the College and attendance was required Monday to Friday in the morning and the afternoon.[15]

[28] The audio recording from the General Division hearing confirms the Claimant testified that he was a full-time student, both while at high school and when at College.[16]

[29] So, there is no arguable case that the General Division misconstrued or misunderstood that the Claimant was taking only two high school courses when it decided the Claimant was a full-time student.

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[12] See section 58(1)(c) of the DESD Act.
[13] See paragraph 22 of the General Division decision.
[14] See GD3-17 to GD3-18.
[15] See GD3-19 to GD3-20.
[16] I heard this on the audio recording from the General Division hearing at approximately 0:8:20 and at approximately 0:10:45.

[30] The General Division was also aware the Claimant had combined full-time work with full-time school previously.

[31] Specifically, the General Division accepted that the Claimant had a history of full-time work while attending school. After reviewing the hours and pay periods noted on the Record of Employment from the Claimant's employer for the period from March 29, 2021, to May 4, 2021, the General Division accepted that the Claimant had a few weeks of near full-time hours. However, the General Division concluded that this was not enough of a history of combining full-time work with full-time school to rebut the presumption of non-availability.[17]

[32] The General Division also considered whether the Claimant had shown exceptional circumstances to rebut the presumption of non-availability. The General Division considered the Claimant's course load in May and June 2021 but also the fact the Claimant was required to attend those two classes in the mornings on alternate days. In addition, the General Division considered the Claimant's evidence that he could work more than 30 hours a week with his school schedule, if the work included weekends. The General Division also considered that the Claimant had declared in his Training Questionnaire that if he found a job that conflicted with school, he would finish school. Having regard to those facts, the General Division concluded that the Claimant had not shown exceptional circumstances. Rather, the General Division decided, the Claimant's priority was to complete school.[18]

[33] The General Division reached a similar conclusion with the period during which the Claimant attended College starting September 8, 2021. The General Division considered that the Claimant was required to attend classes in person on Tuesdays and Wednesdays, and online on Thursdays and Fridays, from 9:00 a.m. to 1:00 p.m. each day. It considered the Claimant's evidence that he worked on Saturdays and Mondays at the same job he left in May 2021 and could work after school. The General Division also considered that the Claimant reported in a training questionnaire that he would

[17] See paragraphs 23 to 27 of the General Division decision.
[18] See paragraphs 28 to 31 of the General Division decision.

finish school if he found full-time work that conflicted with school. The General Division concluded these facts showed the Claimant's priority was school so he had not shown exceptional circumstances to rebut the presumption of non-availability.

[34] Since the General Division considered the Claimant's school schedule and his prior history of combining full-time work with school when it decided if the Claimant had not rebut the presumption of non-availability, it is not arguable that the General Division overlooked those facts.

[35] Strictly speaking, having found the Claimant had not rebutted the presumption of non-availability while attending school full time, the General Division was only required to assess whether the Claimant had proven his availability for work for the period he was not in school, being June 30, 2021, to September 7, 2021. However, it assessed whether the Claimant had proven his availability for the entire period of disentitlement anyway.

[36] The General Division decided the Claimant had a sincere desire to find work.

[37] The General Division considered the Claimant's job search efforts and the fact the Claimant returned to his part-time seasonal job where he worked from October 16, 2021, to December 12, 2021. The General Division decided that for May and June 2021, and after December 2021, the Claimant made enough efforts to find a suitable job but he had not done so from July to December 2021. This was because he didn't apply for any jobs in this period.

[38] The General Division's finding of fact that the Claimant didn't apply to any jobs from July to December 2021 was consistent with the evidence before it. Specifically, the Claimant confirmed in his post-hearing documentation that through July and August he did not apply to any positions. He explained he was contacted in September by his former employer to work part-time from October to December 2021, where he worked

part-time on Mondays and Saturdays. The Claimant mentions following up with two temporary agencies after being laid off from that job.[19]

[39] The General Division also concluded that the Claimant had unduly limited his chances of going to work, given he wouldn't leave his schooling for a full-time job that conflicted with work and he had made attendance at school a priority.

[40] This was a conclusion the General Division was entitled to reach. The General Division's conclusion was consistent with case law from the Federal Court of Appeal that only being available to work irregular hours around a course schedule that significantly limits availability is inconsistent with the requirements of availability under the *Employment Insurance Act*.[20] I am satisfied the General Division considered the Claimant's specific situation. The General Division was aware of the Claimant's school schedule, his required attendance at his classes, and his unwillingness to take a full-time job that conflicted with his schooling.

[41] I have reviewed the documentary record and the audio recording from the General Division hearing and I have not found any key evidence that the General Division ignored or misinterpreted when it decided the Claimant was not available for work from May 2, 2021.[21]

[42] It is not arguable that the General Division based its decision on any erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before.

[43] I understand the Claimant disagrees with the General Division decision and finds the result unfair. The Claimant is essentially asking me to reassess the evidence and come to a different conclusion. But that is not the Appeal Division's role. To permit the

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[19] See GD8.
[20] See *Duquet v Canada (Attorney General)*, 2008 FCA 313.
[21] The Federal Court has recommended such a review be done in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

appeal to move forward, the Claimant must show that it is arguable that the General Division has made a reviewable error.

[44] I cannot intervene where the General Division applies settled law to the facts, as it did here.[22]

[45] In his Application to the Appeal Division, aside from the alleged factual errors, the Claimant has not identified any other reviewable errors such as an error of jurisdiction or an error of law. The Claimant has not pointed to any procedural unfairness and I see no evidence that the General Division proceeded in an unfair way.

[46] After reviewing the record, the decision of the General Division and considering the arguments the Claimant made in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success. So, I am refusing permission to appeal.

Conclusion

[47] I am refusing permission (leave) to appeal. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division

[22] The General Division applied the test from *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96 to decide whether the Claimant had proven his availability for work.